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No. 06-726

# In the Supreme Court of the United States

E.I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENTS

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## QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may bring an action against another potentially responsible party under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), or under federal common law.

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## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is reported at 460 F.3d 515. The district court's memorandum opinion concerning respondents' motion for judgment on the pleadings (Pet. App. 115a-121a) is unreported. The district court's earlier memorandum opinion concerning respondents' motion for summary judgment (Pet. App. 76a-112a) is reported at 297 F. Supp. 2d 740.

### JURISDICTION

The judgment of the court of appeals was entered on August 29, 2006. A petition for rehearing was denied on October 30, 2006 (Pet. App. 124a-125a). The petition for a writ of certiorari was filed on November 21, 2006. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Like the government's petition for a writ of certiorari in *United States* v. *Atlantic Research Corp.*, No. 06-562 (filed Oct. 24, 2006), the petition in this case presents the principal question left open by the Court two Terms ago in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004): Whether a party that is potentially responsible for the cleanup of property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but is not eligible to bring an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may nevertheless bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a). In this case, the court of appeals correctly held that a potentially responsible party cannot pursue such an action under Section 107(a). That decision, however, conflicts with the decisions of two other courts of appeals, including the decision of the court of appeals in *Atlantic Research*. For the reasons stated below, the petition for a writ of certiorari should be granted.

1. The relevant statutory provisions are discussed in greater detail in the government's petition in *Atlantic Research*. Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). As amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, CERCLA provides the President, acting

primarily through the Environmental Protection Agency (EPA), with several alternative means for cleaning up contaminated property. Most important for present purposes, Section 106(a) permits EPA to compel, by means of an administrative order or a request for judicial relief, other persons to undertake response actions, which EPA then monitors. See 42 U.S.C. 9606(a). Section 107(a) imposes liability for cleanup costs on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs)—associated with the release or threatened release of hazardous substances. See 42 U.S.C. 9607(a). Unless they can invoke a statutory defense or exclusion, persons who qualify as PRPs are liable for, *inter alia*, "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(A), and "any other necessary costs of response incurred by any other person consistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(B).

Before CERCLA was amended by SARA in 1986, lower courts disagreed as to whether one PRP could bring an action against another PRP for contribution or cost recovery, and, if so, the source of authority for such an action. See 06-562 Pet. at 4 (citing cases). With the enactment of SARA, however, Congress added Section 113(f), which provides PRPs with an express cause of action against other PRPs in two specific circumstances. First, Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. 9613(f)(1). Second, Section 113(f)(3)(B) provides that "[a] person who has resolved

its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement." 42 U.S.C. 9613(f)(3)(B).

In *Cooper Industries*, *supra*, this Court held that, in order to pursue an action for contribution against another PRP under Section 113(f)(1), a PRP must itself have been sued under either Section 106 or Section 107(a). See 543 U.S. at 165-168. The Court expressly left open the principal question presented here —namely, whether a PRP could bring an action against another PRP for cost recovery under Section 107(a), see *id.* at 168-170—but it noted that "numerous decisions of the Courts of Appeals" had held that an action for cost recovery under Section 107(a), on a theory of joint and several liability, was unavailable, *id.* at 169.

2. In 1997, petitioners, two major corporations and a subsidiary, filed suit against respondents, the federal government and various departments and agencies, in the United States District Court for the District of New Jersey, seeking to recover costs that petitioners incurred in cleaning up environmental contamination at 15 industrial facilities they owned in nine different States. Petitioners contended that, because the federal government had previously owned (or exercised substantial control over) each of those facilities, the United States was a PRP for purposes of Section 107(a) of CERCLA. Although petitioners initially brought suit under both Section 107(a) and Section 113(f), they subsequently dropped their Section 107(a) claim, on the ground that the Third Circuit had held, in two intervening cases, that a PRP could not bring an action against another PRP for cost recovery under Section 107(a). Pet. App. 19a-20a &

n.13, 77a; see *In re Reading Co.*, 115 F.3d 1111 (1997); *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116 (1997).

The district court subsequently designated the claim by petitioner E.I. du Pont de Nemours and Company (DuPont) concerning a facility it owned in Louisville, Kentucky, as a "test case" for purposes of pretrial proceedings. Pet. App. 20a, 77-78a. DuPont manufactures neoprene, a synthetic rubber product, at the Louisville facility. *Id.* at 79a. Respondents conceded that the federal government was a PRP with regard to that facility because a government agency owned the facility from 1942 to 1948. *Ibid.* Because the Louisville facility produces and disposes of hazardous waste on an ongoing basis, DuPont was required to obtain a permit for the facility under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*; DuPont incurred the cleanup costs for which recovery was being sought to comply with specific provisions of its permit. Pet. 9 n.2; see 42 U.S.C. 6925(a). Although RCRA contains no provision allowing a permit holder to recover costs or seek contribution from other parties, costs incurred in complying with RCRA may qualify as response costs recoverable under CERCLA. See, *e.g.*, *United States* v. *Rohm & Haas Co.*, 2 F.3d 1265, 1274-1275 (3d Cir. 1993); *Mardan Corp.* v. *C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1053-1054 (D. Ariz. 1984), aff'd, 804 F.2d 1454 (9th Cir. 1986). With regard to the Louisville facility, it was undisputed, first, that DuPont had not been sued under either Section 106 or Section 107(a), and second, that DuPont had not entered into a relevant administrative or judicially approved settlement for purposes of Section 113(f)(3)(B). Pet. App. 20a.

3. Respondents moved for summary judgment as to DuPont's claim concerning the Louisville facility, contending that, based on the undisputed facts, DuPont had not satisfied the prerequisites for bringing an action for contribution with regard to that facility under Section 113(f). The district court granted respondents' motion. Pet. App. 76a-112a. In reasoning consistent with that later adopted by this Court in *Cooper Industries*, the district court held that DuPont could not bring suit under Section 113(f)(1) because "[t]here is no Section 106 or Section 107 action," *id.* at 88a; that DuPont could not bring suit under Section 113(f)(3)(B) because "there is no prior settlement," *id.* at 90a; and that DuPont was not aided by the savings clause in Section 113(f)(1), which provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106 or Section 107]," because DuPont could not "meet the requirements of a traditional, common law contribution action," *id.* at 96a.

4. Respondents then moved for judgment on the pleadings with regard to the remaining facilities. The district court granted respondents' motion and dismissed the remainder of petitioners' claims with prejudice. Pet. App. 115a-121a. The court reasoned that "there is nothing in the record before this Court establishing or tending to establish with regard to any of the remaining sites that any Plaintiff * * * either has settled a * * * claim [for purposes of Section 113(f)(3)(B)] or has been named a defendant in a (prior or on-going) CERCLA § 106 or CERCLA § 107 action." *Id.* at 119a.

5. While the case was pending on appeal, this Court held in *Cooper Industries* that, in order to pursue an action for contribution against another PRP under Sec-

tion 113(f)(1), a PRP must itself be sued under Section 106 or Section 107(a). Because *Cooper Industries* foreclosed petitioners from arguing that they could bring suit for contribution under Section 113(f), petitioners instead argued on appeal that, in the wake of *Cooper Industries*, they should be permitted to bring suit instead under Section 107(a) (or under federal common law). The court of appeals affirmed. Pet. App. 1a-75a.

a. The court of appeals began by recognizing that it had previously held that a PRP could not bring an action against another PRP for cost recovery under Section 107(a) (or under federal common law). Pet. App. 10a-14a (citing *Reading*, *supra*, and *New Castle County*, *supra*). In reaffirming its rule that a PRP could not bring an action against another PRP under Section 107(a), the court of appeals expressly rejected the approaches of the Second Circuit in *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90 (2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006), and the Eighth Circuit in *Atlantic Research Corp.* v. *United States*, 459 F.3d 827 (2006), petition for cert. pending, No. 06-562 (filed Oct. 24, 2006). Pet. App. 27a-31a & n.18. The court of appeals reasoned that this Court's decision in *Cooper Industries* "did not explicitly or implicitly overrule our precedents" but instead "expressly declined to consider the very questions at issue here." *Id.* at 33a.

The court of appeals then rejected the argument that a rule precluding one PRP from suing another under Section 107(a) would be "in direct opposition to CERCLA's broad remedial purpose." Pet. App. 36a. The court observed that, "[w]hile it is clear that CERCLA's drafters intended common law principles to govern liability, we have not found evidence in the legis-

lative history that Congress contemplated this would extend a contribution right to PRPs engaged in entirely voluntary cleanups." *Id.* at 40a. Moreover, the court noted, "SARA's legislative history * * * reveals an express bent toward encouraging settlements." *Id.* at 42a. The court concluded that "SARA's settlement scheme is inconsistent with * * * a right" to recover costs for a PRP's voluntary cleanup. *Id.* at 47a. Instead, the court reasoned, "Congress intended to allow contribution for settling or sued PRPs as a way to encourage them to admit their liability, settle with the Government, and begin expeditious cleanup operations pursuant to a consent decree or other agreement." *Id.* at 56a.

The court of appeals acknowledged that "it could be that encouraging *sua sponte* voluntary cleanups by capable PRPs is in the public's interest, and would be a better way to protect health and the environment than pressuring them into settlement agreements." Pet. App. 58a-59a. The court reasoned, however, that "[t]his is not self-evident." *Id.* at 59a. Instead, the court concluded, "the debate over whether our national environmental cleanup laws should favor prompt and effective cleanups in any manner * * * or should favor settlements and other enforcement actions * * * is a matter for Congress, not our Court." *Id.* at 59a-60a.

b. Judge Sloviter dissented. She noted that "[t]wo of our sister circuits have recently considered the same issue presented here and both have decided, contrary to the majority, that section 107(a) can be used by a responsible party to seek contribution from another responsible party." Pet. App. 69a.

6. The court of appeals denied a petition for rehearing en banc, with Judge Sloviter indicating that she would have granted the petition. Pet. App. 124a-125a.

## DISCUSSION

In the wake of this Court's decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), there is a clear conflict among the courts of appeals on the principal question left open in that case: *i.e.*, whether a potentially responsible party can pursue an action against another PRP under Section 107(a). The government has filed a petition for a writ of certiorari in *United States* v. *Atlantic Research Corp.*, No. 06-562 (filed Oct. 24, 2006), in which it has asked this Court to grant review to resolve that circuit conflict. Although the court of appeals here, unlike the court of appeals in *Atlantic Research*, correctly held that a PRP cannot bring suit under Section 107(a), this case would also constitute a suitable vehicle for resolution of the circuit conflict. Because the petition in this case will likely be ripe for consideration before the petition in *Atlantic Research*, and in light of the need for expeditious resolution of the recurring question presented by these cases concerning the remedies available under CERCLA, the petition for a writ of certiorari should be granted.

1. As the government explained in its petition in *Atlantic Research* (at 9-14), and as petitioners correctly note (Pet. 11-13), the decision of the court of appeals in this case conflicts with the earlier decisions of the Second Circuit in *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90 (2005), and the Eighth Circuit in *Atlantic Research*, 459 F.3d 827 (2006). In *Consolidated Edison*, the Second Circuit held that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs in-

curred voluntarily." 423 F.3d at 100. And in *Atlantic Research*, the Eighth Circuit held that Section 107(a) provides a PRP with an express right of cost recovery against another PRP, 459 F.3d at 834-835, and, in the alternative, that "a right of contribution may be fairly implied from the text of [Section 107(a)]," *id.* at 835. In reaffirming its pre-*Cooper Industries* decisions holding to the contrary, the court of appeals in this case expressly rejected the approaches of the Second and Eighth Circuits. See Pet. App. 27a-31a & n.18. On the other hand, the decision of the court of appeals is consistent with numerous pre-*Cooper Industries* decisions from other courts of appeals, which held that one PRP could not bring an action against another under Section 107(a) in various circumstances in which the plaintiff PRP could not avail itself of Section 113(f). See 06-562 Pet. at 5 n.2 (citing cases).

2. For the reasons discussed in greater detail in the *Atlantic Research* petition (at 15-23), and contrary to the arguments advanced by petitioners here, the court of appeals in this case correctly held that one PRP cannot bring an action against another under Section 107(a). The relevant language in that section provides that PRPs shall be liable for "any other necessary costs of response incurred *by any other person* consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B) (emphasis added). The most natural reading of the phrase "any *other* person" is that it excludes the persons who are the subject of the sentence: *i.e.*, PRPs. And even if Section 107(a) could be construed to contain an implied right to contribution, as petitioners suggest (Pet. 25-27), it would at most contain a right to "contribution" in its traditional sense: that is, a right by one party to recover an

amount from a jointly liable party after the first party has extinguished a disproportionate share of their common liability to a third party. Such an implied right to contribution would not help petitioners, which have not extinguished any liability to a third party and are thus not seeking "contribution" as that term is traditionally defined.

Even assuming, moreover, that Section 107(a), standing on its own, could be construed to confer on a PRP a cause of action against another PRP for cost recovery, that provision must be read in light of Section 113(f), which provides a PRP with an express cause of action against another PRP in two enumerated circumstances. See CERCLA § 113(f)(1) and (3)(B), 42 U.S.C. 9613(f)(1) and (3)(B). The better view is that the subsequently enacted Section 113(f) specifies the exclusive circumstances in which one PRP may bring suit against another under CERCLA. Allowing a PRP to bring suit under Section 107(a) would render Section 113(f) effectively superfluous and undermine CERCLA's settlement scheme, because a PRP that has not yet been sued under Section 106 or Section 107(a) might refuse to settle with the government in order to preserve its right to sue under Section 107(a) (and thereby take advantage of the substantially more generous provisions applicable to such an action).

3. Although the court of appeals here (unlike the court of appeals in *Atlantic Research*) correctly held that one PRP cannot bring an action against another under Section 107(a), this case would provide a suitable vehicle for resolution of the circuit conflict on that question. As this case comes to the Court, it is clear that petitioners would not be entitled to proceed with their claims under Section 113(f). See Pet. App. 61a-62a (af-

firming the district court's decision to grant judgment on the pleadings on the ground that, "based solely on the pleadings, appellants have not set out facts sufficient to demonstrate, even by inference, that they could possibly prevail on their claim for contribution under § 113").[1] Like *Atlantic Research*, therefore, this case squarely presents the question whether a PRP that is not eligible to bring an action for contribution under Section 113(f) may nevertheless bring an action against another PRP under Section 107(a).

Petitioners suggest in passing (Pet. 2, 13) that this case would constitute a *better* vehicle for the Court's review than *Atlantic Research* because the court of appeals here held that one PRP could not bring suit against another *either* under Section 107(a) *or* under federal common law. That suggestion is erroneous. Once a PRP moves beyond arguing that Section 107(a) provides an express cause of action under these circumstances, it makes no material difference whether the non-textual contribution right is claimed to be implicit in Section 107(a) or instead to emanate from federal common law. Petitioners' claim that federal common law provides a right to contribution would fail for the same reason as their claim (also advanced by the respondent in *Atlantic Research*) that Section 107(a) contains an implied right to contribution. Even assuming that Section 107(a) or Section 113(f) did not displace such a common-law right to contribution, it would at most con-

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[1] While the case was on appeal, counsel for the government learned that EPA had previously brought suit against DuPont under Section 107(a) with regard to one of the other facilities at issue. Upon the government's recommendation, the court of appeals converted the district court's dismissal of DuPont's claim with regard to that facility into a dismissal without prejudice. See Pet. App. 62a n.33, 63a.

stitute a right to "contribution" in its traditional sense: that is, a right by one party to recover an amount from a jointly liable party after the first party has extinguished a disproportionate share of their common liability to a third party. Thus, if the Court were to hold (either in this case or in *Atlantic Research*) that a PRP could not bring suit against another PRP based on an implied right to contribution in Section 107(a), it would necessarily mean that a PRP could not bring suit based on any analogous right under federal common law. This case and *Atlantic Research* therefore would constitute equally suitable vehicles for this Court's review.[2]

4. The petition for a writ of certiorari in this case was filed after the petition in *Atlantic Research*. It appears, however, that the petition in this case will be ripe for consideration before the petition in *Atlantic Research*.[3] Although the government believes that there

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[2] A third case presenting the same question as this case and *Atlantic Research* is currently pending, in which the Court invited the Solicitor General to file a brief expressing the views of the United States. See *UGI Utilities, Inc.* v. *Consolidated Edison Co. of New York, Inc.*, petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006). For the reasons stated in that brief, which is being filed contemporaneously with this one, the United States believes that *UGI Utilities* would constitute a less suitable vehicle for resolution of the common question presented than either this case or *Atlantic Research*. In particular, that case, unlike this case or *Atlantic Research*, does not present the question of whether one PRP could bring an action against another on a non-textual basis.

[3] The government filed its petition in *Atlantic Research* on October 24, 2006; the petition in this case was filed on November 21. Counsel for the government informed counsel for the respondent in *Atlantic Research* that the government would object to any extension of time that would foreclose the Court's ability to grant certiorari and hear that case this Term, and counsel for the respondent indicated that he did not anticipate needing to seek such an extension. On November 22, how-

are no material differences between the two cases in terms of their appropriateness for review, the Court may wish to grant review both in this case and in *Atlantic Research*.[4] In the event that the Court does so, it should consolidate the cases for oral argument. If the Court determines, however, that it cannot grant review in *Atlantic Research* in time to allow both cases to be heard and decided this Term, it should grant review in this case and then hold the petition in *Atlantic Research*. As the government explained in the *Atlantic Research* petition (at 24-26), prompt review is desirable in order to end the ongoing uncertainty in the lower courts and provide definitive resolution of the question presented by these cases concerning the remedies available under CERCLA.[5]

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ever—two days before the response to the petition would have been due—counsel for the respondent informed counsel for the government that the respondent would be waiving its response. The respondent did not file either a response or a waiver form before the due date. The Court subsequently requested a response, which is due on January 8.

[4] In this case, DuPont incurred the cleanup costs for which recovery is being sought in order to comply with the specific terms of its permit under RCRA, whereas, in *Atlantic Research*, there appears to be no evidence concerning the respondent's motivation in incurring its cleanup costs. In the government's view, however, a PRP is unable to sue another PRP under Section 107(a) regardless of the plaintiff PRP's motivation in incurring the cleanup costs at issue. In any event, petitioners in this case treat DuPont's cleanup as a "voluntary" one (see Pet. 9 n.2, 10, 13) and then argue that a PRP can sue another PRP under Section 107(a) for the costs of *any* voluntary cleanup. See Pet. 17-18.

[5] The practical effect of the respondent's failure to file a response or a prompt waiver in *Atlantic Research*, see note 3, *supra*, would ordinarily be to disable the Court from hearing that case in the current Term, because the Court's "[u]sual[]" practice is to call for and await a response before granting review. See Robert L. Stern et al., *Supreme*

## CONCLUSION

The petition for a writ of certiorari should be granted. In the event that the Court also grants the petition in *United States* v. *Atlantic Research Corp.*, No. 06-562, the cases should be consolidated for oral argument.

Respectfully submitted.

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*Court Practice* 461 (8th ed. 2002); cf. *id.* at 462 (additionally noting that "waivers should be filed promptly, in order to speed up the distribution of the petition and the disposition of the case"). In light of the respondent's conduct and the obvious circuit conflict on (and importance of) the question presented by these cases, however, it would be appropriate for the Court to grant review in *Atlantic Research*, should it wish to do so, without awaiting a response or, at a minimum, without waiting for the case to be conferenced in the ordinary course. A copy of this brief is being furnished to counsel for the respondent in *Atlantic Research*.